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IN THE

Supreme Court of the United States

OCTOBER TERM 1966

No. 1078

THE BORDEN COMPANY, A NEW JERSEY CORPORATION,
Petitioner,

vs.

ORVILLE L. FREEMAN, SECRETARY OF AGRICULTURE, UNITED STATES OF AMERICA, S. R. SMITH, ADMINISTRATOR, AGRICULTURAL MARKETING SERVICES, DEPARTMENT OF AGRICULTURE, UNITED STATES OF AMERICA, AND G. R. GRANGE, DEPUTY ADMINISTRATOR, AGRICULTURAL MARKETING SERVICES, DEPARTMENT OF AGRICULTURE, UNITED STATES OF AMERICA,
Respondents,

and

CAMPBELL SOUP COMPANY, A NEW JERSEY CORPORATION,
Intervenor-Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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THE DARNELL-WILSON PRINTING COMPANY, CHICAGO

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Respondents,

and

CAMPBELL SOUP COMPANY, A NEW JERSEY CORPORATION,

Intervenor-Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

The Borden Company prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered in the above-entitled case on December 29, 1966.

OPINIONS BELOW.

The opinion of the District Court granting the respondent's motion for summary judgment (R. 660)* is reported in 256 F. Supp. 592 and is set forth in Appendix D hereto, *infra*, p. 25a. The District Court's earlier (and unreported) opinion granting petitioner's motion for preliminary injunction (R. 634) is set forth in Appendix C hereto, *infra*, p. 22a. The opinion of the Court of Appeals, which has not yet been reported, is set forth in Appendix F hereto, *infra*, p. 45a.

JURISDICTION.

The judgment of the Court of Appeals was entered on December 29, 1966 (Appendix G hereto, *infra*, p. 46a). The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

QUESTIONS PRESENTED.

At issue is the validity of certain regulations issued by the Department of Agriculture (USDA) under the Poultry Products Inspection Act. Under these regulations, petitioner would be categorically prohibited, on pain of criminal prosecution, from continuing to label its soup products with tradenames which have been used for over 25 years without a single consumer complaint and which had been specifically approved by USDA.

The questions presented are:

1. Whether USDA had the statutory power to promulgate the challenged regulations:

(a) Whether, under this Court's decision in *Houston*

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* "(R. . . . .)" refers to pages in the Joint Appendix filed in the Court of Appeals for the Third Circuit and transmitted to this Court as provided in Rule 21 of the Rules of this Court.

v. *St. Louis Packing Co.*, 249 U. S. 479 (1919), USDA may categorically "deem" a class of labels to be false and deceptive and prohibit their further use without proof that consumers "would be deceived" by the prohibited labels.

(b) Whether USDA, despite the absence of any comparable statutory delegation, has power equivalent to the power specifically granted by Congress to the Food and Drug Administration to establish "quasi-legislative standards of identity" without proof that the prohibited labels are false and deceptive.

(c) Whether USDA has power under the Poultry Products Inspection Act to allocate jurisdiction over a product, as between itself and the Food and Drug Administration, on the basis of the tradename used on the product.

2. Whether due process of law as well as the Administrative Procedure Act were violated:

(a) By USDA's reliance on evidence which USDA refused to disclose on the ground that it was "confidential".

(b) By the denial of any hearing—either at the administrative level or on judicial review—at which petitioner would have an opportunity to rebut such "confidential" evidence.

(c) By the similar denial of any hearing on petitioner's contention and offer to prove that, although the rule-making function had been formally delegated to the Deputy Administrator, he did not exercise any independent judgment in promulgating the challenged amendments but instead was merely carrying out directions of his superiors having nothing to do with consumer deception.

(d) By the limiting of judicial review to an "administrative record" which had been tailored by the agency to omit highly relevant documents (and parts of documents) which are directly opposed to the agency position.

3. Whether the Courts below erred in sustaining the challenged regulations on a wholly different basis than the grounds articulated by the agency itself.

STATUTES INVOLVED.

The statutes principally involved are the Poultry Products Inspection Act, 21 U. S. C. § 451 et seq. (1964), and the Administrative Procedure Act, 5 U. S. C. § 1001 et seq. (1964). Pertinent provisions of these statutes are set forth in Appendix A, *infra,* p. 1a.

STATEMENT.

This action was brought by the petitioner to obtain a declaratory judgment declaring invalid certain amendments to regulations of the United States Department of Agriculture (USDA) under the Poultry Products Inspection Act (PPIA).

These amendments (which are set forth in Appendix B, *infra,* p. 4a) purport to establish standards of identity for (*inter alia*) dehydrated poultry soup mixes. Under these standards, tradenames such as "chicken noodle soup mix" are categorically "deemed" to be false and deceptive, and therefore prohibited, if the tradenames are used on products containing less than specified percentages of chicken meat (App. 17a-20a).* The amendments further provide that such a product, which is otherwise exempt from the PPIA, shall be denied an exemption if it is labeled with a tradename "deemed" to be false and deceptive (App. 19a-20a).

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* The abbreviation "App." as used herein refers to the appendices to this petition, *infra.*

The Wyler Products and the Dehydrated Soup Mix Industry.

Petitioner produces and markets two dehydrated poultry soup mixes—"Wyler's Chicken Noodle Soup Mix" and "Wyler's Chicken Rice Soup Mix". These products have been sold under substantially the same names, and have been processed according to formulae which have remained substantially constant, for over 25 and 15 years respectively (R. 234-237).

Throughout this lengthy period, these products have received ever-increasing popular acceptance (R. 239, 304), and no consumer has ever complained—either to petitioner, its predecessor company* or to USDA—that the names of the products are in any way false or deceptive (R. 158, 197, 237). Furthermore, in 1959, after the PPIA became effective, USDA approved the labels as *not* false and deceptive (R. 25, 26, 137, 140, 217); and this approval continued in full force until March 1, 1963, when the products were exempted by USDA (R. 138).**

Nevertheless, although these products are made from and contain powdered chicken meat (as well as chicken fat), they would fail to qualify under the challenged regulations, which would require a minimum of 2% chicken meat on a ready-to-serve basis (i.e., after the housewife has added a quart of water to the 2-ounce package) in order for petitioner to continue use of its traditional tradenames. Stated in terms of dry weight, the regulations would require a minimum of *33% chicken meat* in each package.*** Unless

* Wyler & Company was acquired by petitioner in 1961.

** When the products became exempt as a result of a change of regulations, defendant Grange advised Wyler that the new regulations "do not imply either approval or disapproval by this agency of the kind name of any exempted product" (R. 510).

*** For institutional packages of the same product, a lesser requirement—*i. e.*, 15% of dry weight—is imposed (App. 20a).

the chicken meat content of these products were increased to that level, petitioner's tradenames would be "deemed" to be false and deceptive (App. 17a) and continued use of the trade-names would subject petitioner to criminal prosecution under Sections 9(d) and 12(a) of the PPIA (App. 2a).

Furthermore, if the chicken meat content of these products were increased to that level, it would result in an unmarketable soup having a muddy appearance and the consistency of gruel, unless the additional chicken meat were in the form of non-soluble chunks (R. 236, 324). It was not until 1961, after petitioner's products had been marketed for approximately 20 years with wide consumer acceptance, that it first became *technologically possible* (with the development of the freeze-drying method) to produce a dehydrated chicken soup mix containing non-soluble chunks of chicken meat (R. 324, 327-328).

Thus, prior to 1961 *every* dehydrated chicken soup mix on the market would have been in violation of the challenged regulations. Even today approximately *two-thirds* of all such mixes (in terms of sales volume) do not contain non-soluble chunks of chicken meat and would fail to qualify (R. 312).*

The Administrative Proceeding.

The challenged amendments were proposed and principally championed by intervenor Campbell Soup Company, which (despite its dominant position in the canned soup market) complained that it was "in a disadvantageous competitive position" because of the tradenames used by

* Both USDA (App. 9a) and the District Court (App. 42a) stated that 90% of all "poultry soups" contain the requisite amount of meat, but this figure is admittedly achieved only by combining sales of canned soups (of which Campbell has 80-90% of the total) with sales of dehydrated mixes and treating them as interchangeable, notwithstanding their fundamental differences in technology (R. 321-323), marketing (R. 273-275), and name (R. 211).

petitioner and other manufacturers of dehydrated soup mixes.* After an informal administrative hearing, the amendments were promulgated by respondent Grange, Deputy Administrator of USDA's Agricultural Marketing Services (App. 21a).

In announcing USDA's intention to promulgate the amendment to Section 81.134, respondent Grange stated that USDA was relying on, among other things, evidence of "consumer expectation and acceptability of these products as established over the years and to comments received from various interested persons . . ." (R. 54). Prior to the USDA hearing, petitioner requested USDA to disclose this evidence "so as to make the administrative procedure more meaningful" (R. 75) and "in the interest of a full and fair hearing" (R. 81). In response, respondent Grange stated that "It is anticipated that *all pertinent information will be developed at the hearing,*" and that

* On April 8, 1963, USDA circulated a notice proposing an amendment to Section 81.134 which would establish labeling standards for many poultry food products *but not for soups or dehydrated soup mixes* (R. 519). However, on August 6, 1963, Campbell wrote to respondent Grange urging that soups and dehydrated soup mixes be included in the amendment (R. 525). Two days later, on August 8, Campbell representatives conferred with Grange and other USDA personnel concerning the matter (R. 537). On August 15, and again on September 27, Senator Fulbright (in whose state Campbell has a large plant, R. 627) wrote to Secretary Freeman supporting the Campbell proposal (R. 625, 627). On September 4, 1963, Campbell again wrote to Grange (with a carbon copy to Senator Fulbright) reiterating its complaint that it is "in a disadvantageous competitive position" and asserting that the proposed amendment should be adopted promptly and without compliance with ordinary rule-making procedures (R. 536). On September 10, 1963, "by special messenger" Campbell sent a package of "Wyler's Chicken Noodle Soup Mix" to USDA "because of your current interest" in the proposal (R. 528).

Campbell's efforts produced quick results. On October 15, 1963, respondent Grange issued a new notice (R. 53) proposing that the amendment to Section 81.134 be modified in substantially the same terms as urged by Campbell in its letter of August 6, 1963 (R. 525). On February 10, 1964, USDA published Campbell's related proposal to amend Section 81.208, the exemption provision (R. 76).

"The Department is not in position *prior to the hearing* to furnish to particular interested persons information which it may have concerning the proposed labeling standards." (R. 82, emphasis added.)

At the USDA hearing, relying on the assurances given by Grange "that all pertinent information will be developed at the hearing," petitioner again requested disclosure of the evidence on which USDA relied in support of the amendments. Plaintiff's request, however, was denied on the ground that such information was "confidential" (R. 370-372).

Accordingly, USDA offered no evidence at the hearing to support the amendments except for the testimony of Hermon Miller, the Director of USDA's Poultry Division. With respect to the labeling standard, Mr. Miller acknowledged that no surveys had been taken and that *"we picked this figure out of the air. . . ."* (R. 202, 205). Mr. Miller likewise testified on deposition that *it "was pretty arbitrary"* (R. 114); that *USDA did not "have any concrete evidence" that the labels are false and deceptive* (R. 125-126); that *"false and deceptive* is something we are not positive on because that *is something that is not tested"* (R. 126); and that *"I don't know that I could say that it is deceptive to the consumer. . . ."* (R. 116.) (Emphasis added.)

The other witnesses at the USDA hearing who supported the regulations did so for a variety of reasons—for example, to eliminate alleged unfair competition between canned soup manufacturers and dehydrated soup manufacturers, and to increase the consumption of poultry. But *none testified that the labels were false and deceptive;* and in fact two of the *proponents* of the amendments (including Campbell's witness) *denied* that labels prohibited by the regulations were deceptive (R. 232, 392-393). Not a single consumer or "consumer oriented group" even bothered to make an appearance at the hearing (R. 129).

Nevertheless, in promulgating the regulations, respondent Grange found that the challenged requirements are "necessary to prevent sale of the product under a false or deceptive name or other false or deceptive labeling" (App. 12a, 7a) and are "supported by substantial evidence as to consumer expectancy . . ." (App. 8a). In this connection, USDA placed heavy reliance on the "written comments" which USDA had refused to disclose at the hearing on the ground that they were "confidential" (App. 7a, 8a).

Proceedings in the Courts Below.

Shortly after issuance of the amendments, the present action was commenced in the United States District Court for the District of New Jersey.* The Court, "taking the probability of irreparable damage to plaintiff-movant, the apparent lack of any harm to government or consumer brought about by a delay, and the substantiality of plaintiff's claim," granted plaintiff's motion for preliminary injunction (App. 24a).

Thereafter Campbell was permitted to intervene in support of the challenged amendments.

Petitioner requested a hearing at which it would have the opportunity to meet the allegedly "confidential" evidence which USDA had refused to disclose but which USDA had relied upon in promulgating the challenged amendments. Petitioner also requested an opportunity to show at such a hearing that the entire administrative proceeding had been pre-judged and that respondent Grange in promulgating the regulations—although he had ostensibly been delegated the rule-making function—was merely carrying out his superiors' directions having nothing to do with consumer deception. Petitioner also objected to the limit-

* Jurisdiction of the District Court was invoked under 28 U. S. C. §§ 1331 and 1337 (1964).

ing of judicial review to the so-called "administrative record" on the ground that it had been tailored by USDA to exclude highly relevant documents (and parts of documents) which were directly opposed to USDA's position.

Each of petitioner's requests and objections was denied. No trial of any kind was held in the District Court. Petitioner was given no opportunity to rebut USDA's "confidential" evidence and likewise was given no opportunity to show that respondent Grange in promulgating the regulations had merely carried out his superiors' directions. Limiting its review to the "administrative record" filed by USDA, and despite the numerous factual issues presented, the Court (Lane, J.) granted respondents' motion for summary judgment (App. 25a).

On the jurisdictional issue, the Court sustained the regulations on the ground that "the Secretary has a general legislative power concerning matters covered by the Poultry Act" (App. 33a). The Court did not dispute the fact that "there are no record proofs that the labels on the Wyler's soups, or any others, affected by the regulations are 'false, deceptive or misleading' ", but nevertheless accepted the respondents' contention that "the Secretary of Agriculture does have the power to establish standards of identity by regulation" even without any "determination that the labels in issue are in fact false, deceptive and misleading" (App. 30a-31a).

On this basis, the Court found it unnecessary to determine whether there was adequate evidentiary support for USDA's findings that the regulations were "necessary to prevent sale of the product under a false or deceptive name" and "supported by substantial evidence as to consumer expectancy". Instead, according to the Court, the only question was whether "the evidence in the record *supporting* the adoption of the regulations as promulgated is sufficient to

refute the contention that the Secretary acted arbitrarily, capriciously, or in abuse of his discretion . . ." in concluding that a standard of identity was desirable (App. 40a, emphasis added). In resolving that question, the Court (App. 41a-42a) relied heavily on the written comments which USDA had refused to disclose on the ground they were "confidential."

On December 29, 1966, the Court of Appeals *per curiam* directed that the District Court's judgment "will be affirmed on the well-reasoned opinion of Judge Lane" (App. 45a).

REASONS FOR GRANTING THE WRIT.

I. THE DECISION BELOW IS IN DIRECT CONFLICT WITH APPLICABLE DECISIONS OF THIS COURT.

A. Houston v. St. Louis Packing Co., 249 U. S. 479 (1919).

The Courts below held that USDA possesses "general legislative power" to promulgate "such general quasi-legislative standards of identity for poultry products as are set forth in § 81.134", and that it is therefore unnecessary to make or review any "determination that the labels in issue are in fact false, deceptive and misleading". As authority for this extraordinary holding, the Courts below relied solely on *Houston* v. *St. Louis Packing Co.*, 249 U. S. 479 (1919). But examination of the *Houston* decision readily demonstrates that such an analysis is patently erroneous and that the decision below is in direct conflict with *Houston.*

1. In *Houston,* in complete contrast to the present case:

(a) the Secretary of Agriculture made a specific finding that the "sausage" label involved there "is false and deceptive" (p. 482) and "resulted in deception of purchasers and consumers" (p. 483);

(b) this Court stated that the question on review was "whether he [the Secretary] acted in good faith and upon substantial grounds" in making that finding (p. 483); and

(c) the regulation in *Houston* was sustained by this Court only after a detailed review of the proof of deception and upon a determination that the Secretary's finding of deception was supported by substantial evidence (p. 486).

The Court in *Houston* stated (p. 484):

> "Whether or not the term 'sausage,' when applied to the product of the appellee, in which more than the permitted amount of cereal and water is used, is false and deceptive, is a question of fact, the determination of which is committed to the decision of the Secretary of Agriculture by the authority given him to make rules and regulations for giving effect to the act, and the law is that the conclusion of the head of an executive department on such a question will not be reviewed by the courts, *where it is fairly drrived at with substantial evidence to support it.*" (Emphasis added.)

In this case, the District Court's opinion—adopted by the Court below—quoted and relied on this very passage from *Houston*. But—rather remarkably—it deleted the whole second clause and made no mention whatsoever of the italicized proviso (App. 32a).

In *Houston*, this Court further stated (pp. 486-487):

> "The result, thus stated, of the examination of the record before us, shows beyond controversy that the Secretary of Agriculture, in promulgating the regulations complained of, acted on *substantial evidence* and with sufficient reason in concluding that persons purchasing or using as 'sausage' the appellee's compound of various meats, cereal, and water *would be deceived* as to its composition and as to its value as a food product. . . ." (Emphasis added.)

Thus, in order to sustain a regulation of this type, the *Houston* decision unequivocally requires a showing of substantial evidence that consumers "would be deceived" by the labels in question. *Houston* also shows the basic fallacy of the decision below (App. 33a) that USDA may "deem" a label to be false and deceptive, merely by USDA's own fiat, and without any proof that the label is false and deceptive.

2. It is true that the Food and Drug Administration (FDA) has the power to establish general standards of identity without proof of consumer deception. *But that power was conferred on the FDA by express statutory delegation* (21 U. S. C. §§ 341, 343). The PPIA, however, contains no comparable provision, thus quite clearly demonstrating that Congress did not intend that USDA have an equivalent power. On the contrary, the only authority which USDA has in this area is, by virtue of Section 8(b) of the PPIA (App. 1a), to prohibit the use of labels which are false and deceptive.

Moreover, not even the FDA has the kind of untrammeled and unreviewable power which the Courts below attributed to USDA. Although the FDA has a vastly greater responsibility than USDA with respect to food content and labeling, and although the FDA—unlike USDA—is expressly authorized to promulgate standards of identity for food products by rule-making proceedings, FDA orders establishing such standards must be "based only on substantial evidence of record" at a hearing held in conformity with express statutory requirements (21 U. S. C. § 371(e)). See *Federal Security Administrator* v. *Quaker Oats Co.*, 318 U. S. 218, 221 (1943).

Although Section 8(b) of the PPIA does *not* contain a grant of authority in any way comparable to the authority conferred on the FDA, it does specifically provide a quasi-judicial procedure to be followed by USDA in preventing false and deceptive labeling. Under this procedure, if the Secretary has reason to believe that a particular label is false and deceptive, the administrative determination of whether it is false and deceptive is to be made after an adversary trial-type hearing, and of course is subject to full judicial review. Yet, according to the decision below this whole statutory scheme—and all the procedural safeguards specifically imposed by Congress—may be circum

vented by the simple device of promulgating regulations which purportedly "have the force and effect of law" (R. 631, 632) and which categorically prohibit a whole class of labels without any proof of consumer deception and under pain of criminal prosecution.

B. United States ex rel. Accardi v. Shaughnessy, 347 U. S. 260 (1954).

The decision below is also in conflict with this Court's decision in *United States ex rel. Accardi* v. *Shaughnessy,* 347 U. S. 260 (1954).

In *Accardi,* this Court established the principle that a subordinate administrative official who has been delegated discretionary authority "must exercise his authority according to his own understanding and conscience" and that it is a violation of due process for a department head —after delegating such authority by published rule—to dictate the decision of the subordinate official (p. 267). In *Accardi,* this Court also held that a party alleging that the subordinate official had failed to exercise his own independent judgment, and that the challenged decision had been dictated by his superior despite the delegation, is entitled to prove his allegations before a reviewing court (p. 268). See also *Service* v. *Dulles,* 354 U. S. 363 (1957).

The pertinent facts in this case are precisely comparable to those in *Accardi.* The regulations challenged here were promulgated by respondent Grange, the Deputy Administrator of Agricultural Services, who had ostensibly been delegated the authority to promulgate such regulations by the Secretary of Agriculture.* As a consequence, under

* For the initial delegation by the Secretary of Agriculture, see 22 F. R. 7108 (Aug. 30, 1957), amending 19 F. R. 74 (Jan. 5, 1954). For the subdelegation of this authority to the Deputy Administrator, see 28 F. R. 496, 498 (Jan. 17, 1963) and 29 F. R. 3114 (Mar. 5, 1964).

Accardi, respondent Grange was obliged to "exercise his authority according to his own understanding and conscience" and the Secretary was similarly obliged to avoid dictating the decision in any manner.

In the Courts below, petitioner contended and offered to prove that the challenged regulations were not the product of the Deputy Administrator's independent judgment based on the record before him, but were promulgated by him without regard to the record because he was directed to do so by his superiors for reasons having nothing to do with consumer deception. In the circumstances—including Campbell's sponsorship of the amendments and USDA's apparent concession that the Secretary *did* make the decision*—the refusal of the Courts below even to afford petitioner a hearing on its allegations was clearly in conflict with this Court's decision in *Accardi.*

C. S. E. C. v. Chenery Corp., 332 U. S. 194 (1947), reaffirmed in Burlington Truck Lines, Inc. v. United States, 371 U. S. 156 (1962), and N. L. R. B. v. Metropolitan Life Ins. Co., 380 U. S. 438 (1965).

The challenged amendment to the labeling regulation is explicitly based on a specific finding in the regulation itself that "The requirements of this section are hereby found to be necessary for this purpose"—*i.e.,* "to prevent sale of the product under a false or deceptive name. . . ." (App. 12a). In addition, the accompanying Statement of Considerations not only repeats the same finding but

* In the Court below, the respondents sought to justify USDA's deletion from the "administrative record" of certain documents—including documents prepared by respondent Grange—on the basis of "the Secretary's conclusion that the administrative record . . . could not properly include letters written by his subordinates which were not part of the evidence before him. . . ." (Supplemental brief of appellees, p. 3). Respondent Grange is, of course, one of "his subordinates."

further finds that the labeling requirement "is supported by substantial evidence as to consumer expectancy. . . ." (App. 7a, 8a).

Yet the decision below upholds the validity of the regulation on the ground that these factual findings are, in effect, immaterial because of USDA's alleged "general legislative power" to promulgate "general, quasi-legislative standards of identity for poultry products" without proof that the prohibited labels are false and deceptive. The decision below is thus in direct conflict with this Court's decision in *S. E. C.* v. *Chenery Corp.*, 332 U. S. 194, 196 (1947), holding that the propriety of agency action must be judged "solely by the grounds invoked by the agency," and that "if those grounds are inadequate or improper, the court is powerless to affirm the administrative action. . . ."

This holding was recently reaffirmed in *Burlington Truck Lines, Inc.* v. *United States*, 371 U. S. 156 (1962), and *N. L. R. B.* v. *Metropolitan Life Ins. Co.*, 380 U. S. 438 (1965). In *Burlington*, this Court stated (pp. 168-169):

> "The courts may not accept appellate counsel's post hoc rationalizations for agency action; *Chenery* requires than an agency's discretionary order be upheld, if at all, *on the same basis articulated in the order by the agency itself.*" (Emphasis added.)

As the Court pointed out in *Metropolitan* (p. 444), this is required by "the integrity of the administrative process", and "For reviewing courts to substitute counsel's rationale or their discretion for that of the Board is incompatible with the orderly function of the process of judicial review".

Under these decisions, USDA having based its action on a finding that the regulation is necessary to prevent consumer deception and "is supported by substantial evidence as to consumer expectancy", the regulation can be sustained—if at all—only on that ground. By seeking to

sustain the regulation on a wholly different basis, the decision below is in direct conflict with those decisions.

II. THE DECISION BELOW PRESENTS SUBSTANTIAL QUESTIONS OF FEDERAL PROCEDURE, INVOLVING BOTH THE CONSTITUTION AND THE ADMINISTRATIVE PROCEDURE ACT, WHICH SHOULD BE DETERMINED BY THIS COURT.

In *Houston,* this Court recognized that a regulation of the type challenged by this action could be sustained only if the requisite finding as to deception "is fairly arrived at" (249 U. S. at 484). Similarly, but in greater detail, this Court declared in *Greene* v. *McElroy,* 360 U. S. 474, 496-497 (1959), speaking through Chief Justice Warren:

> "Certain principles have remained relatively immutable in our jurisprudence. One of these is that where governmental action seriously injures an individual, *and the reasonableness of the action depends on fact findings,* the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue. * * * We have formalized these protections in the requirements of confrontation and cross-examination. They have ancient roots. * * * This Court has been zealous to protect these rights from erosion. It has spoken out not only in criminal cases, * * * *but also in all types of cases where administrative and regulatory actions were under scrutiny.*" (Citing, e.g., *Morgan* v. *United States,* 304 U. S. 1 (1938), emphasis added.)

In the *Morgan* case (*supra*), the action of the Secretary of Agriculture in fixing the maximum rates to be charged by market agencies at stockyards was challenged. The proceeding was concededly one "looking to legislative action" (298 U. S. at 479). Nevertheless, USDA "was found by the Court to have made determinations in the nature of adjudications affecting legal rights" (*Hannah* v. *Larche,*

363 U. S. 420, 451 (1960)) and accordingly the Secretary's action was set aside "for his failure to conduct a trial-like hearing" (*ibid.*).

In the instant case, as Chief Justice Hughes stated in *Morgan*:

> "The [USDA] answer that the proceeding before the Secretary was not of an adversary character, as it was not upon complaint but was initiated as a general inquiry, is futile. *It has regard to the mere form of the proceeding and ignores realities.*" (304 U. S. at 20, emphasis added.)

The regulations challenged in this case are more clearly particular and adjudicatory in nature than the USDA "legislative" action in *Morgan*. This is true, not only in terms of the purpose of the proceeding and the small number of persons who are the target of the proceeding, but also because the regulations purport to constitute a determination that the tradenames of those persons are false and deceptive.

"This determination has consequences that are serious to the condemned organizations." *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U. S. 123, 175 (1951) (concurring opinion of Douglas, J.). Particularly is this so in view of USDA's position that the regulations "have the force and effect of law" (R. 631, 632) and that violation of the challenged labeling standard would expose petitioner to the peril of criminal penalties.

A. USDA's Reliance on "Confidential" Evidence.

The "requirements of confrontation and cross-examination" reaffirmed in *Greene* v. *McElroy, supra,* were given short shrift by USDA in this proceeding. USDA purported to give petitioner a "hearing" but converted it into a meaningless gesture by refusing, on the ground that it

was "confidential", to disclose the evidence on which it relied in issuing the amendments.* Petitioner was thereby deprived of an opportunity to meet and impeach the "confidential" evidence and to confront and cross-examine those who offered such evidence.

As Mr. Justice Frankfurter pointed out in the *Joint Anti-Fascist* case, *supra*, "fairness can rarely be obtained by secret, one-sided determination of facts decisive of rights. . . . Secrecy is not congenial to truth-seeking and self-righteousness gives too slender an assurance of rightness. No better instrument has been devised for arriving at truth than to give a person in jeopardy of a serious loss notice of the case against him and opportunity to meet it." (341 U. S. at 170, 171-172, concurring.)

B. Denial of Any Hearing on Judicial Review to Meet USDA's "Confidential" Evidence.

USDA's refusal to afford a meaningful "hearing" to meet the "confidential" evidence might well have been cured if the petitioner had been given such an opportunity on judicial review. See, e.g., *Jordan* v. *American Eagle Fire Ins. Co.*, 169 F. 2d 281, 289 (D. C. Cir. 1948).

But instead the Courts below compounded the violation of due process by denying any hearing at all and by similarly placing heavy reliance on the "confidential" evidence (App. 41a-42a). By contrast, "an elaborate trial on the merits" was held in the *Houston* case (249 U. S. at 482).**

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* The inadequacy of the so-called "hearing" is further demonstrated by the fact that the witnesses were not sworn and were not under any obligation to answer questions (R. 171-172).

** See also *Armour & Co.* v. *Freeman*, 304 F. 2d 404, 406, 409, 412 (D. C. Cir. 1962), where the Court recognized that a trial was necessary and proper in determining the validity of a similar USDA regulation.

Furthermore, as already pointed out (*supra*, pp. 15-16), the Courts below refused petitioner any hearing on its offer to prove that the decision ostensibly made by respondent Grange had actually been dictated by his superiors in direct violation of the principle established by this Court in the *Accardi* case.

C. The Tailored "Administrative Record".

The denial of any hearing on judicial review is particularly objectionable because of the nature of the "administrative record" to which the Courts below restricted their review.

Section 10(e) of the Administrative Procedure Act provides that "In making the foregoing determinations the court shall review the *whole* record. . . ." (Emphasis added.) But it is abundantly clear that the "administrative record" filed by USDA did not constitute "the *whole* record." On the contrary, apart from the transcript of the USDA "hearing", the "administrative record" consists of an arbitrary selection of documents from the USDA file, and was carefully tailored to *exclude* dozens of highly relevant documents (and even parts of documents) which are directly opposed to USDA's position.

Two examples will demonstrate the point:

1. In issuing the challenged regulations, respondent Grange referred to the military specifications then in effect for a dehydrated chicken soup mix and stated that "The Department is informed that the proper name used in the specifications for the product is 'Soup, Dehydrated, Chicken Flavored'" (App. 9a). The only part of the specifications which USDA chose to include in the "administrative record" was the *cover page*, which includes the title "Soup, Dehydrated, Chicken Flavored" (R. 517). But USDA chose to *omit* from the "administrative record" the rest of

these specifications, which *affirmatively required* that the product be labeled "Soup, Dehydrated, Chicken"—a name which would *violate* the challenged regulations.

2. USDA's "Statement of Considerations" places great reliance on the "formulae which are on file" with USDA (App. 7, 8). The inference, of course, is that these "formulae which are on file" constitute a cross-section of the formulae of all dehydrated chicken soup mixes, and that USDA thus considered the whole industry in drawing the line at the percentage required by the regulations. However, the truth is that the only "formulae which are on file" were *formulae for the minority of mixes which already meet the challenged standard.* This vital fact is revealed in a USDA document which USDA withheld from the "administrative record."*

Despite these examples and many others of a similar nature, the Courts below declined to go beyond the documents selected by USDA, and thus even the "record" certified to this Court does not contain the omitted documents.

To permit an agency to "pick and choose" the evidence by which the agency's action is to be judged not only violates the Administrative Procedure Act and minimal standards of fairness** but furthermore is inconsistent with the basic premise of judicial review.

Even when considered separately, but in particular when considered cumulatively, the procedures employed in this case—USDA's reliance on "confidential" evidence; the

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* In a letter dated February 14, 1964, from Frank Blood, Deputy Director of the Poultry Division, to Arnold Mayer, one of the witnesses at the hearing held the following month, Mr. Blood stated: "On your request for exact proportions of the contents of dehydrated soup mixes, *we no longer have the formulae on file because such products are exempt*"—*i. e.*, products accounting for approximately *two-thirds* of the market.

** See, *e.g.*, *Northeast Airlines, Inc.* v. *C. A. B.*, 345 F. 2d 484, 486 (1st Cir. 1965).

Courts' denial of any opportunity to rebut the "confidential" evidence or to offer proof on the *Accardi* issue; and the tailored "administrative record"—present at the very least a substantial question warranting review by this Court.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for certiorari should be granted.

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